Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1886

LOUIS J. SIRICO, JOHN C. LEGARI
AND
ALBERT DE MATTEO, Petitioners

V.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No.

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UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE UNITED STATES

The Petitioners, LOUIS J. SIRICO, JOHN C. LEGARI, and ALBERT DE MATTEO, respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Third Circuit entered March 5, 1979. Petition for Rehearing In Banc was denied on May 14, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit has not yet been reported. It is reproduced in the Appendix to this petition. The Denial of the petition for Rehearing In Banc is likewise reproduced in the Appendix.

JURISDICTION

The Denial of Petition for Rehearing In Banc before the Third Circuit Court of Appeals was entered on May 14, 1979. The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Did not the twenty (20) month delay in the execution of sentences violate the petitioners' right to a speedy trial and thwart society's interest therein?

Did not the twenty (20) month delay violate the defendants' right to due process of law?

STATEMENT OF THE CASE

On August 1, 1975, a United States Grand Jury sitting in Newark, New Jersey returned a two-count indictment charging LOUIS J. SIRICO, JOHN C. LEGARI, ALBERT DE MATTEO and another with (1) having conspired in violation of 18 U.S.C. §371 to steal from a motor truck goods and chattels having a value in excess of ONE HUNDRED ($100.00) DOLLARS and with (2) having committed the actual theft in violation of 18 U.S.C. §659.

On January 21, 1976, trial commenced and continued until January 28, 1976. The defendants were found guilty by the jury on both counts. On March 22, 1976, SIRICO was sentenced to one (1) year imprisonment. On March 25, 1976, DE MATTEO was sentenced to two (2) years imprisonment and LEGARI was sentenced to three (3) years imprisonment.

Notice of appeal was filed by appellant SIRICO on March 29, 1976 and by appellants LEGARI and DE MATTEO on April 2, 1976. Each defendant was released on FIVE THOUSAND ($5,000.00) DOLLARS surety bond.

On October 18, 1976, the United States Court of Appeals for the Third Circuit affirmed the convictions.

All three (3) defendants were immediately informed by their respective counsel of the appellate decision and were advised to await notification from the federal authorities as to their surrender date.

Each of the defendants heard nothing from the Government until some twenty (20) months later when they received notice to surrender into the custody of the United States Marshall on July 10, 1978.

The surrender date was subsequently adjourned until July 24, 1978. On that

date, all three (3) defendants moved to vacate the sentences pursuant to 28 U.S.C. §2255. The Honorable Herbert J. Stern, U.S.D.J., denied the motion and also denied bail pending appeal. A Notice of Appeal was filed that day on behalf of all three (3) defendants.

On that same date, the Honorable Leonard I. Garth, Circuit Judge for the Third Circuit Court of Appeals, ordered that bail be continued pending review of this bail determination by a panel of this Court.

The Motion for Bail Pending Appeal was granted by a panel of this Court (Seitz, Chief Judge and Hunter, Circuit Judge) on August 1, 1978. The Court set an accellerated briefing schedule.

On March 5, 1979, the United States Court of Appeals for the Third Circuit affirmed the rulings of the trial court (a- a). Petitioners' Petition for Re-

hearing In Banc was denied on May 14, 1979 (a).

REASONS FOR GRANTING THE WRIT

A. The twenty (20) month delay in the execution of sentences, through no fault of the petitioners, violated the petitioners' right to a speedy trial. Additionally, society's interest in the speedy trial concept was totally thwarted. In light of the following, it is respectfully urged that both the district court for the District of New Jersey and the United States Court of Appeals for the Third Circuit erred in ordering the petitioners to serve their sentences at this late date.

Recently, both Congress and the federal judiciary have expressed great concern for one particular aspect of criminal procedure - the constitutional right of a defendant to a speedy trial. While the speedy trial guaranty found in the Sixth Amendment often focuses on the trial itself, the actual service of the sentence is a most important and integral part of the speedy trial concept.

By following in detail a criminal episode from the commission of the crime through the time when the felon is released from custody, one can readily see that the law provides for a speedy and orderly progression at every stage of the criminal process. The first procedural safeguard afforded a criminal defendant is the applicable statute of limitations.

> The purpose of a statute of limitations is to limit exposure to criminal prosecution to a certain fixed period of time following the occurrence of those acts the legislature had decided to punish by criminal sanctions. Such a limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-

> distant past. Such a time limit may also have the salutary effect of encouraging law enforcement officials promptly to investigate suspected criminal activity. (emphasis added)

Toussie v. United States, 397 U.S. 112, 114-115, 25 L.Ed.2d. 156, 161, 90 S.Ct. 358 (1970). The general five year statute of limitations on criminal actions may not be modofied "[e]xcept as otherwise expressly provided by law." 18 U.S.C. §3282. The statute of limitations is not the only safeguard provided for preindictment delay. In United States v. Lovasco, 431 U.S. 783, 789, 52 L.Ed.2d 752, 758, 97 S.Ct. 2044 (1977), this Court held that the Due Process Clause also plays a role in protecting the defendant against oppressive preindictment delay.

It is after indictment that the Sixth Amendment's right to a speedy trial attaches. The right to a speedy trial has been held:

> essential to protect at least three basic demands of criminal justice in the Anglo-American legal system: (1) to prevent undue and oppressive incarceration prior to trial, (2) to minimize anxiety and concern accompanying public accusation and (3) to limit the possibilities that long delay will impair the ability of an accused to defend himself. (emphasis added)

Smith v. Hooey, 393 U.S. 374, 377-78, 21 L.Ed.2d 607, 611, 89 S.Ct. 773 (1966). This common law protection has been greatly expanded by the Speedy Trial Act of 1974, 18 U.S.C. §3161 et seq. Therein, Congress has mandated that each district court adopt a speedy trial plan which must adhere to the provisions set forth in the Federal Speedy Trial Act of 1974. See 18 U.S.C. §3165. Any delays, whether pre or post indictment, are also subject to judicial scrutiny. A judge has the power to dismiss an indictment for any unreasonable delay in the criminal process. Fed. Rules Cr. Proc. rule 48(b), 18 U.S.C.

Upon judgment of conviction, a defendant is entitled to swift imposition of his sentence. "Sentence shall be imposed without unreasonable delay." Fed. Rules Cr. Proc. rule 32(a)(1), 18 U.S.C. Afortiori, the defendant should likewise be entitled to a swift execution of his sentence.

On June 30, 1978, the Judicial Council of the Third Circuit approved the Final Plan of the United States District Court for the District of New Jersey. This plan requires that a defendant be sentenced within forty-five (45) days of his conviction. Plan For A Prompt Disposition of Criminal Cases, §II 7(a), reprinted in 102 N.J.L.J. 1, 7 col. 1. It violates both logic and common sense for Congress and the courts to insist upon a speedy imposition of sentence without an attendant provision for the speedy execution of such sentence. Obviously, the actual service

of the sentence is the most important aspect of the criminal process as it affects both the defendant and society.

The predictability of the sentence itself has been of great concern, especially in the Third Circuit. See Addonizio v. United States, 573 F.2d 147 (3rd Cir. 1978); United States v. Salerno, 542 F.2d 1005 (3rd Cir. 1976). These cases deal with the sentencing expectations of the trial judges. That court was seeking to insure stability in sentencing procedure during the time when the parole guidelines were changed.

The actual time a prisoner is to be released is also protected by safegu rds. A sentence must commence when the defendant is received at the penitentiary, 18 U.S.C. §3568. The date when the prisoner is first eligible for parole is clearly set out, 18 U.S.C. §4205(a), as is the time that the prisoner should be released on parole, 18 U.S.C. §4206(d). Likewise, the United

States Parole Commission has adopted guidelines to determine the release date of a prisoner, See 28 C.F.R. 2.20 et seq., which serve to protect the rights of the defendant-prisoner.

The foregoing analysis clearly demonstrates the substantive and procedural safeguards afforded the defendant at every step of the criminal prosecution; from commission of the crime to the time of his release on parole. These safeguards serve to protect not only the individual defendant but also society as a whole.

Society also has a right to the swift and orderly disposition of criminal offenders. Congress recognized this interest while considering the Speedy Trial Act of 1974. "The Committee believes that the right to a speedy trial belongs not only to the defendant, but to society as well." H.R. Rep. No. 93-1508, 93d Cong., 2d Sess., reprinted in (1974) U.S. Code Cong. and Ad.

News 7401, 7408. The House Judiciary Committee Report went on to state that a defendant is a burden to society because he wastes administrative resources and also drains our nation's revenues.

However, notwithstanding the critical importance of the actual execution of sentence, there is a puacity of case law defining to what extent the execution of sentences relates to the constitutional right to a speedy trial.

That is the issue to be determined in the instant case.

Here, the petitioners were convicted in January of 1976. All three (3) defendants were sentenced in March of that year by the Honorable Herbert J. Stern, U.S.D.J. On October 18, 1976, this Court affirmed those convictions. Yet it was not until July of 1978 that the petitioners were ordered to surrender. This inordinate delay was admittedly due to an administrative error. This

twenty (20) month delay, not caused in any way by the petitioners, has violated their right to a speedy trial.

On the Motion to Vacate the Sentences, the government contended that the defendants could have ended their dilemma by "one phone call", to the appropriate law enforcement official. (T10.6). Yet, this oversimplified statement totally missed the point. The defendant is under no affirmative duty to incarcerate himself. That is the burden of the government and they cannot shift it to the defendant.

Judge Stern was keenly aware of the government's duty towards these petitioners when he stated, "[t]hey aren't required to put themselves in jail. You are required to put them in jail." (T9.15-.17). On this issue, the fact that none of the petitioners had exceeded an eighth grade education is most relevant.

Each was represented by counsel at

trial and on appeal. One of the attorneys on appeal has since died. Each petitioner consulted his attorney, and was told in effect that they would have to "sweat it out". During the period of October, 1976 through July, 1978, these men were gainfully employed. They did not flee or attempt to go into hiding. At all times they remained within the jurisdiction of the District of New Jersey, (T3.18-4.10). Each defendant was thus waiting to go to jail, and did nothing to prevent his incarceration.

So, too, the public's interest in swift justice has been totally thwarted. Congress has stated that this interest is an actual right of the public: "the Sixth Amendment is a right of the community as well as of any particular defendant." S.Rep. No.1021, 93d Cong., 2d Sess. 15 (1974) There was no longer any benefit for society to gain from the incarceration of these

petitioners twenty (20) months later or at this late date. In fact, the opposite is sure to occur. Society's interest in swift justice is twofold. First, there is the real concern that non-rehabilitated criminals not be permitted to return to the streets. Second, swift justice will, in the long run, cost less than delayed justice. To incarcerate these three (3) men now would be to defeat both interests.

In this case, it was very probable that all three (3) petitioners would have been discharged from custody as of the date they were ordered to surrender had they been incarcerated promptly. At this present date, the petitioners would certainly have been released. The cost to the taxpayer of incarcerating them now, plus the loss of the tax revenues these men presently generate, would amount to a substantial sum of money. Also, it is apparent that these three (3) middle-aged men have progressed

towards total rehabilitation much more rapidly by meaningful employment than they would have had they been incarcerated. To put them in jail now would be to end certain rehabilitation and begin questionable rehabilitation. Thus, society would surely lose by any incarceration at this time.

In its Per Curiam Opinion, the United States Court of Appeals for the Third Circuit held that even if the Sixth Amendment right to a speedy trial includes the right to a speedy execution of sentence, no violation of that right occurred in this case. The Court of Appeals did not, however, address the very serious issue of society's interest in the proper and swift administration of criminal justice. Congress has manifested its concern with this problem by implementing the Speedy Trial Act, 18 U.S.C. §3161 et seq.. From the Opinion of the Court, it appears that the public has no interest where there is a delay in the exe-

cution of sentence.

It is respectfully urged that this Court grant certiorari to clarify the impact of the Sixth Amendment and the Speedy Trial Act of 1974 in the unique circumstances where there is a lengthy delay in the imposition of sentence.

B. The twenty (20) month delay in the execution of sentence violated the petitioners' constitutional right to due process of law.

The United States Constitution insures that every defendant be afforded due process of law in a criminal proceeding. As stated recently, the test is whether or not the action complained of violates those fundamental conceptions of justice which lie at the base of our political institutions and which define the community's sense of decency and fair play. United States v. Lovasco, 431 U.S. at 790, 52 L.Ed.2d at 759.

There can be no serious doubt that the actual length of a prison term is fundamental in our concept of justice. The action complained of in this case, a twenty (20) month delay in the execution of sentences through no fault of defendants, does indeed go against all notions of fair play and decency. Society's concept of fair play in a criminal proceeding requires that only

certain parties will have discretion over the disposition of a defendant. These parties include the jury, the judges (both at trial and on appeal) and the United States Parole Commission. These are the only parties who are authorized to exercise discretion as to the length of sentence. All other parties merely perform ministerial actions. For example, society will not allow a jail warden to keep a defendant incarcerated for longer than his sentence, nor may a bailiff exercise discretion to remove a defendant from the court during trial. These actions would violate the Due Process Clause of the Fifth and Fourteenth Amendments.

To allow ministerial officials to violate the order of the sentencing judge and place the defendant in jail when they see fit is also a violation of due process because it shocks the community's sense of fair play and decency.

The United States Court of Appeals for the Ninth District had occasion to deal with this problem over forty (40) years ago. They concluded:

> The least a prisoner is entitled to is the execution of the sentence of the court to whose judgment he is duly subject, and if a ministerial officer charged with the duty to execute the court's orders fails to carry them out, that failure cannot be charged up against the prisoner, who is entitled to serve his time promptly, and must be deemed to be serving it from the date he is ordered to do so and is in the custody of the marshal under the commitment, even though, without his fault, the marshal neglects to place him in the proper custody. Any other holding would give the marshal, a ministerial officer, power more arbitrary and capricious than any known in the law, since a prisoner sentenced for one (1) year might be required to wait forty (40) under the shadow of his unserved sentence before it pleased the marshal to incarcerate him. Such

> authority is not even granted to courts of justice, let alone their ministerial officers.

Smith v. Swope, 91 F.2d 260, 262 (9th Cir. 1937). See also, In re Jennings, 118 F. 479, 481 (C.C.E.D. Mo. 1902).

In Smith, supra, the court held that since no legal excuse had been shown for the Sheriff's failure to deliver the defendant to the state penitentiary, the defendant had served his sentence and was entitled to be discharged.

In People Ex. Rel. Powers v. Shattuck, 274 Ill. 491, 113 N.E. 921 (1916), the court released a defendant stating:

> A proper and orderly administration of justice required that when a judgment of conviction is entered steps be promptly taken to carry the judgment into effect unless there is some proper reason for delay, since if such delays were tolerated it would be unfair to the defendant and to the people to leave such matters to the caprice of the judge, and held that at such a

> late date the court was without power to enforce either the sentence directing imprisonment, or the order for imprisonment until the fine was satisfied.

As was enunciated in Ex parte Bugg, 163 Mo. App. 44 (1912), the lapse of any specific period of time would not ipso facto lead to a discharge, but each case should rest upon its own peculiar facts, and such course followed as will best promote the ends of justice.

The proposition that a delay in sentencing violates due process has been extended to require the release of a prisoner where he had violated parole, was ordered back to prison but the ministerial officer did not enforce the order for five (5) years. Stetson v. Mahoney, 42 F.Supp. 298 (E.D.Wash. 1942).

From the foregoing authorities, it is apparent that the petitioners in this case should not have been charged with a detriment caused by the misfeasance or non-

feasance of the officials whose duty it was to incarcerate them promptly. To allow these ministerial officers to now incarcerate the petitioners would deny them due process of law.

While the Third Circuit did find that the government's actions did not amount to a violation of fundamental concepts of justice, and hence no due process violation (a n. 4), the Court did not shed sufficient light on the implementation of the fundamental concepts of justice espoused in United States v. Lovasco, 431 U.S. 783, 790 (1977).

Therefore, petitioners seek review by this Court to determine whether fundamental concepts of justice were violated.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a writ of certiorari be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 78-1966

UNITED STATES OF AMERICA

V.

GUS C. SANTORELLA, LOUIS J. SIRICO,
JOHN C. LEGARI, and ALBERT DeMATTEO

LOUIS J. SIRICO, JOHN C. LEGARI
and ALBERT DeMATTEO, Appellants

(D.C. Crim. No. 75-361)

Appeal from the United States District Court
for the District of New Jersey

Submitted October 5, 1978

Before Seitz, Chief Judge, Hunter, Circuit Judge, and Cahn,* District Judge

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*Edward N. Cahn of the United States District Court for the Eastern District of Pennsylvania, sitting be designation.

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OPINION OF THE COURT

(Filed: March 5, 1979)

Per Curiam

On January 28, 1976, appellants Louis J. Sirico, John C. Legari, and Albert De Matteo were found guilty of violating 18 U.S.C. §§371, 659.[1] Thereafter, the district judge sentenced Sirico to one year of imprisonment, Legari to two years of imprisonment, and DeMatteo to three years of imprisonment. On October 18, 1976, this court affirmed their convictions. Counsel for appellants then advised them that they would remain free on bail until the government ordered them to surrender to begin serving their sentences. Because of an administrative oversight, the govern-

[1] 18 U.S.C. §371 proscribes any conspiracy to commit an offense or to defraud the United States. 18 U.S.C. §659 proscribes, among other things, the theft of any goods of chattels from a motortruck.

ment did not send appellants the surrender notices until June 26, 1978--more than twenty months after their convictions had been affirmed. During that hiatus, appellants made no inquiries to the United States Attorney's office although they did consult with their attorneys. Appellants received the notice to surrender on June 26, 1978, and subsequently filed a motion pursuant to 28 U.S.C. §2255.[2] The district court denied the motion following a hearing on the merits and this appeal followed.[3]

[2]The notice directed appellants to surrender on July 10, 1978. Although this date was subsequently adjourned until July 24, 1978, no reason is given for the adjournment. Appellants did not file their §2255 motion until July 18, 1978, more than one week after the original surrender date.

[3]Although there is no indication that the government questioned the district court's jurisdiction to hear the case, it now argues by footnote and without supportive citation that since appellants are free on bail, they are not "in custody" within the meaning of §2255 and therefore this court cannot entertain their motions. This argument is completely without merit. In Hensley v. Municipal Court, 411 U.S. 345 (1973), the Supreme Court held that a defendant convicted of a misdemeanor and released on his own recognizance fulfilled the custody requirement of 28 U.S.C. §2241. This court extended Hensley in Russo v. Superior Court of New Jersey, 483 F.2d 7 (3d Cir. 1973), where we held that Hensley applied to defendants convicted of felonies. It is immaterial that Hensley and Russo construed the custody requirement of §2241 whereas this case requires construction of the custody requirement of §2255. In U.S. v. Washington, 341 F.2d 277 (3d Cir.), cert. denied, 382 U.S. 850 (1965), we held that the custody requirements of §§2241 and 2255 were identical.

We must now decide if the twenty-month delay between the affirmance of appellants' convictions and their receipt of the surrender notice violated their Sixth Amendment right to a speedy trial.[4] We hold that it did not. In reaching this

[4]The other claims made by appellants are without merit. First, it is clear that the mere lapse of time will not entitle appellants to the relief which they seek. Anderson v. Corall, 263 U.S. 193 (1923). Second, the delay in the execution of appellants' sentence does not violate the Speedy Trial Act, 18 U.S.C. §3161-74. That statute does not, either by its terms or as applied, cover the execution of a defendant's sentence. 18 U.S.C. §3161. Third, the government's actions have not deprived appellants of their right to due process of law. As discussed infra, appellants have failed to show that they were prejudiced by the delay,

conclusion we do not decide whether the constitutional right to a speedy trial includes the right to a speedy execution of sentence. Rather, we find that even if the Sixth Amendment does include such a right, the government's actions in this case did not violate it. Barker v. Wingo, 407 U.S. 514 (1972); U.S. v. Campisi, 583 F.2d 692 (3d Cir. 1978). Cf. Pollard v. U.S., 352 U.S. 354 (1957)(court assumed arguendo that the Sixth Amendment right to a speedy trial included the right to a speedy imposition of sentence but found no violation).

(Footnote continued)
and their claim therefore lacks one of the essential elements of any due process claim. U.S. v. Marion, 404 U.S. 307 (1971). Furthermore, we cannot find that the twenty month delay violates those "fundamental conceptions of justice which lie at the base of our civil and political institutions" and thus amounts to a due process violation. U.S. v. Lovasco, 431 U.S. 783, 790 (1977), quoting Mooney v. Holohan, 294 U.S. 103, 112 (1935). Fourth, compelling appellants to serve their sentences now will not subject them to double punishment in violation of the double jeopardy clause of the Fifth Amendment. See Ex Parte Lange, 85 U.S. (18 Wall.) 163 (1873). A double jeopardy violation would require a finding that appellants were actually serving their sentences while they were free on bail awaiting the government's surrender notice. Since Congress has expressly provided that "the sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence," 18 U.S.C. §3568, we cannot make such a finding. However, none of these conclusions forecloses consideration of appellants' Sixth Amendment claim.

We reach this conclusion by following the analysis which the Supreme Court developed in Barker v. Wingo, 407 U.S. 514 (1972). The Court in Barker identified four factors which must be examined in deciding whether a defendant's right to a speedy trial has been violated. In U.S. v. Campisi, 583 F.2d 692 (3d Cir. 1978), this court applied the balancing test enunciated in Barker.[5] As in Campisi, we find

[5]Although at this stage of the proceedings we could limit ourselves to announcing what we believe to be the proper analysis of this matter and remand the case to the district court for application of the balancing test, we do not think that we need to adopt such a cumbersome procedure. Both the Supreme Court in Barker and this court in Campisi applied the balancing test at the appellate level. We do feel, however, that it is

no Sixth Amendment violation here.

The first factor we must weigh is the length of the delay. Although a twenty-month delay is sufficient to raise a speedy trial inquiry, courts have found that far longer delays do not violate the Sixth Amendment. Pollard v. U.S., 352 U.S. 354 (1957)(24 months); U.S. v. Tortorello, 391 F.2d 587 (2d Cir. 1968)(29 months). But cf. U.S. vs. Campbell, 531 F.2d 1333 (5th Cir. 1976)(6 years); Juarez-Casares v. U.S., 496 F.2d 190 (5th Cir. 1974) (31 months); U.S. v. James, 459 F.2d 443 (5th Cir.), cert. denied, 409 U.S. 872 (1972)(3 years); Brady v. Superintendent, 443 F.2d 1307 (4th Cir. 1971)(8 years). Therefore, we conclude that the twenty-month delay which occurred in this case does not constitute a de facto violation of appellant's right to a speedy trial. See U.S. v. Tanu, No. 78-1225 (2d Cir. Nov. 17, 1978). Furthermore, the delay was not so excessive as to weigh in favor of appellants' claim.

The second factor which we must consider is the reason for the delay. In this case the delay resulted from the government's mistake or inadvertence. Due to personnel changes the government lost track of appellants' file and did not send out the surrender notices until it discovered the oversight twenty months later. Since there is no allegation of bad faith, this factor does not weigh heavily against the government. Nevertheless, it "should be considered because the ultimate responsibility for such circumstances must rest with the government rather than the defendant." Barker v. Wingo, 407 U.S. 514, 531 (1972). Therefore, this factor weighs against the government, albeit

(Footnote continued)
more appropriate for the trial judge to apply the balancing test.

slightly.[6]

Third, we must consider the appellants' responsibility for asserting their rights.[7] As the Barker court reasoned, the more serious the infringement, the more the individual can be expected to complain. 407 U.S. at 531. In this case, although appellants made their concerns known to their attorneys, they did not complain to the government. Complaints made to counsel cannot be given the same weight as complaints made directly to the government. Therefore, we cannot conclude that by making inquiries to counsel appellants asserted what they now claim was their constitutional right to a speedy imposition of sentence.[8] While this failure is not determinative, it does "make it difficult for a defendant to prove that he was denied a speedy trial," 407 U.S. at 532, and weighs heavily against appellants.[9]

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[6]In Barker the Supreme Court explained that negligence was a "more neutral" reason for the delay than "[a] deliberate attempt to delay the trial in order to hamper the defense, [which] should be weighed heavily against the government." 407 U.S. at 531. We do not take this to mean that negligence is a completely neutral reason. Given the court's directive to consider it, we are constrained to find that it weighs against the government. A contrary finding would be tantamount to approving the government's negligent behavior.

[7]Appellants have not waived their Sixth Amendment rights by failing to raise them earlier; a waiver must be knowing, intelligent, and voluntary. Inaction alone cannot be considered a waiver. Barker v. Wingo, 407 U.S. 514, 525-26 (1972). The appellants' failure to assert their rights is only one of the

(Footnote continued)
four factors to be considered in deciding whether their rights were violated. 407 U.S. at 531.

[8]Appellants do not contend that counsel's failure to complain to the government deprived them of the effective assistance of counsel, and we express no view on the merits of such an allegation.

[9]Finding that appellant's failure to assert their rights weighs heavily against them is not necessarily inconsistent with finding that the government's negligence in not sending appellants their surrender notices weighs slightly against it. By the very nature of the balancing process come factors will weigh for and some against a particular side. The Supreme Court faced precisely the same dilemma in Barker; there the Court explained that the government's negligence "should be considered since the ultimate responsibility for such circumstances must rest with the government rather than with the defendant,"407 U.S. at 531,

Finally, Barker instructs us to balance the prejudice to the appellants as a result of the delay. Appellants claim that the delay resulted in uncertainty. However, they concede that the delay did not adversely affect the rehabilitation process. Since appellants claim to be gainfully employed and rehabilitated, we cannot find that whatever uncertainty resulted from the delay seriously prejudiced them. Indeed, appellants appear not to have objected to the delay and probably hoped that it would result in their never having to go to jail at all. Like the third factor, the absense of prejudice supports the government's claim.

We conclude that on balance these factors weigh against appellants. Their failure to assert their claimed right and the absense of prejudice are particularly important. Although it is clear to us that the government's processing of appellants' cases was negligent, we cannot hold that its inadvertence resulted in a violation of appellants' constitutional rights. We therefore hold that even if the Sixth Amendment right to a speedy trial includes the right to a speedy execution of sentence, no violation of that right occurred in this case.

The decision of the district court is affirmed.

TO THE CLERK:

Please file the foregoing opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No 78-1966

UNITED STATES OF AMERICA

v.

GUS C. SANTORELLA, LOUIS J. SIRICO,
JOHN C. LEGARI and ALBERT DeMATTEO

LOUIS J. SIRICO, JOHN C. LEGARI
and ALBERT DeMATTEO, Appellants

(Criminal No. 75-361, D. of N.J.)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge,
ALDISERT, ADAMS, GIBBONS, ROSENN,
HUNTER, WEIS, GARTH, HIGGINBOTHAM,
Circuit Judges, and
CAHN*, District Judge.

*Edward N. Cahn of the United States District Court for the District of Pennsylvania, sitting by designation.

The petition for rehearing filed by Appellants

in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ SEITZ
Chief Judge

Dated: May 14, 1979